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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

H. JASON GOLD, in his Capacity as Chapter 7 Trustee for Guy R. Detrick, GORDON P. PEYTON, in his Capacity as Chapter 7 Trustee for Donna Detrick, and FAST FORWARD, INC.,

Petitioners,

—v.—

PANALPINA, INC., PANALPINA AIRFREIGHT, INC., MULTI-MODAL FREIGHT SYSTEMS, INC., MULTI-MODAL FREIGHT SYSTEMS OF VIRGINIA, and SYLVAN FRIEDMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners alleged that they were injured by respondents' scheme to defraud the United States and foreign governments through fraudulent overbilling of freight costs for foreign arms shipments. A federal criminal investigation terminated the scheme, and eventuated in the indictment and conviction of one of the respondents herein and of co-conspirators, as well as the pending indictment of an employee of another respondent. Petitioners sought to recover for a violation of Section 1962(a) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), resulting from the criminal scheme. They suffered economic harm by reason of the respondents' criminal misconduct in April 1990, but they did not discover until March 1991 that respondents' scheme was the source and cause of that injury. Petitioners filed suit in March 1995, within four years of the discovery that respondents caused the injury, but more than four years after discovery of the underlying economic harm. The district court and the court of appeals applied the "injury discovery" rule of RICO accrual to bar petitioners' RICO claims as untimely.

The questions presented are:

1. In order to resolve the conflict among the courts of appeals and with this Court's own precedents, what uniform rule for accrual of RICO claims should the Court adopt?

2. In adopting a uniform rule for accrual of civil RICO claims, should the Court require, at a minimum, that the plaintiff have discovered not merely the occurrence of economic harm, but the source and cause of that injury?

The Court should adopt the accrual rule enunciated in *United States v. Kubrick*, 444 U.S. 111, 120-22 (1979). As applied to this case, that rule requires that a plaintiff have discovered her injury and the source or cause thereof in order to trigger the running of the four-year RICO statute of limitations. Petitioners' claims here were timely under that rule.

On January 10, 1997, the Court granted *certiorari* in *Klehr v. A.O. Smith Corporation*, No. 96-663, which presents the identical questions presented here, but which arises in the context of claims under Section 1962(c) of RICO, not in the context of claims under Section 1962(a). In *Klehr*, petitioners and their *amici* urge the Court to adopt the "last predicate act" rule of accrual, while respondents urge the Court to adopt the "injury discovery" rule without the element of discovery of the *source* of injury. Petitioners ask that the Court grant *certiorari* in this case because, in contrast to *Klehr*, the circumstances of this case present a paradigmatic racketeering claim under Section 1962(a) of RICO, and because this case clearly demonstrates the demarcation between discovery of the underlying racketeering injury and the source of that injury, and thus aptly demonstrates the necessity for and correct application of the proper accrual rule—the *Kubrick* rule—in RICO cases.

Alternatively, petitioners ask that the Court defer consideration of the petition pending the decision in *Klehr*, and then grant the petition, either to resolve the case based upon its decision in *Klehr*, or to remand the case in light of the decision. *See, e.g., Keney v. New York*, 388 U.S. 440 (1967) (granting petition and summarily reversing in light of intervening precedent); *Eckerd Drugs, Inc. v. Brown*, 457 U.S. 1128 (1982) (granting petition, vacating judgment below, and remanding in light of intervening precedent); *Lane v. Smith*, 457 U.S. 1102 (1982).

* * *

LIST OF PARTIES—Rules 14.1(b) and 29.6

A. Parties Originally Named in the District Court.
Plaintiffs originally named in the district court were: Guy R. Detrick, Donna Detrick, Fast Forward, Inc., and Northeast Container Corporation. Neither Fast Forward, Inc. nor Northeast Container Corporation has any parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.6. Defendants originally named in the district court were: Panalpina, Inc., Panalpina Air Freight, Inc., Multi-Modal Freight Systems, Inc., Multi-Modal Freight Systems of Virginia, Sylvan Friedman, American Motor Lines, Inc., Baltimore Freightways, Inc., Blue Star Freight Lines, Inc., General Motor Lines, Inc., Hagerstown Motor Express, Inc., Jennifer Motor Express, Inc., Maryland Transport and Storage Company, Mills Trucking, Inc., National Motor Lines, Inc., New Windsor Express, Inc., South Carolina Motor Express, Inc., Tidewater Trucking Company, Inc., U.S. Motor Express, Inc., U.S. Transport Group, Vista Motor Express, Inc., and John Does 1-10.

B. Changes of Parties in the District Court.
Plaintiffs dismissed Northeast Container Corporation as a plaintiff. Plaintiffs dismissed as defendants all named defendants other than Panalpina, Inc.; Panalpina Air Freight, Inc.; Multi-Modal Freight Systems, Inc.; Multi-Modal Freight Systems of Virginia, and Sylvan Friedman.

C. Changes of Parties in the Court of Appeals.
Petitioners J. Jason Gold and Gordon P. Peyton, respectively the bankruptcy trustees for Guy and Donna Detrick, were substituted as parties-appellant in the stead of the Detricks by contested motion in the court of appeals. *See* App. at 13a-15a.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

H. JASON GOLD, in his Capacity as Chapter 7 Trustee for Guy R. Detrick, GORDON P. PEYTON, in his Capacity as Chapter 7 Trustee for Donna Detrick, and FAST FORWARD, INC.,

Petitioners,

vs.

PANALPINA, INC., PANALPINA AIRFREIGHT, INC., MULTI-MODAL FREIGHT SYSTEMS, INC., MULTI-MODAL FREIGHT SYSTEMS OF VIRGINIA, and SYLVAN FRIEDMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

H. Jason Gold, in his capacity as Chapter 7 Trustee for Guy R. Detrick, Gordon P. Peyton, in his capacity as Chapter 7 Trustee for Donna Detrick, and Fast Forward, Inc., petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on March 18, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 108 F.3d 529 (Murnaghan, C.J.), and is reprinted in the appendix hereto at a4 *et seq.*, *infra*. The memorandum order of the United States District Court for the Eastern District of Virginia, Alexandria Division (Hilton, D.J.) has not been reported. It is reprinted in the appendix hereto at a1 *et seq.*, *infra*.

JURISDICTION

Petitioners brought the within RICO action in the United States District Court for the Eastern District of Virginia, Alexandria Division.[1] They invoked federal jurisdiction under 28 U.S.C. § 1331. The district court granted respondents' motions for summary judgment on petitioners' RICO and Virginia state law conspiracy claims and petitioners' cross-motion for summary judgment on state law contract claims. On petitioners' appeal and respondents' cross-appeal, the United States Court of Appeals for the Fourth Circuit entered judgment on March 18, 1997, affirming the district court's order in all respects. No rehearing has been sought. Petitioners invoke the jurisdiction of this Court to review the judgment of the court of appeals under 28 U.S.C. § 1254(1).

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[1] The term "petitioners" includes, where the context requires or admits, not only the named petitioners herein, but also the named plaintiffs and appellants, Guy Detrick and Donna Detrick, in, respectively, the district court and the court of appeals.

STATUTE INVOLVED

Section 1962(a) of RICO, 18 U.S.C. § 1962(a), provides, in pertinent part, that:

> [i]t shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Section 1961 of RICO, 18 U.S.C. § 1961, defines "racketeering activity" to include:

> any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud). . . .

Section 1964(c) of RICO, 18 U.S.C. § 1964(c), provides that:

> [a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. . . .

STATEMENT OF THE CASE

Introduction

Guy R. Detrick, Donna Detrick, and Fast Forward, Inc. ("Fast Forward") were engaged in the business of providing warehouse services to domestic and international freight forwarders. (JA 201-2, 366)[2] Respondents Sylvan Friedman ("Friedman") and Multi-Modal Freight Systems, Inc. and Multi-Modal Freight Systems of Virginia (collectively, "Multi-Modal") were similarly engaged in the business of freight warehousing, forwarding, and servicing. Respondents Panalpina, Inc., and Panalpina Airfreight, Inc. (collectively, "Panalpina") are substantial international freight forwarders. (JA 194) Petitioners alleged that respondents had devised a scheme to defraud the United States, and had invested the proceeds of their racketeering activity in a RICO enterprise. Petitioners further alleged that they had been driven from their business through and by reason of that investment, thereby causing them injury in violation of Section 1962(a) of RICO. (JA 24) They sought to recover principal damages in the amount of at least $1.5 Million, trebled as permitted by 18 U.S.C. § 1964(c), together with attorneys fees and costs. (JA 57)

The Government Investigation and Criminal Proceedings

Following their discovery of respondents' criminal scheme, but several years before they brought their own case, petitioners took their information concerning the illegal scheme to the agents of the federal government. They met with and assisted the Internal Revenue Service, the Office of the Inspector General of the U.S. Department of State, the Federal Bureau of Investigation, and the Defense Investigatory Service. (JA 808-

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[2] References styled "JA___" are to the pages of the Joint Appendix lodged with the court of appeals.

17, 842) The information petitioners imparted to the government has to date resulted in respondent Friedman's guilty plea on charges arising from the respondents' conspiracy and the indictment and conviction at trial of employees of D.F. Young, Inc. ("D.F. Young"), a co-conspirator also engaged in the freight forwarding business, as well as the continuing investigation of Panalpina and its officers, agents, and employees.[3] (JA 61) Most recently, an employee of Panalpina was indicted on federal income tax evasion charges arising from the scheme that forms the basis of petitioners' claims.[4]

The Criminal Scheme

Petitioners' injury arose from respondents' scheme to defraud the United States and foreign governments in connection with the Foreign Military Sales Program ("FMSP"), a federal program authorized by the Arms Export Control Act, 22 U.S.C. § 2751 *et seq.*, and the Foreign Military Sales Authorizations Act, 22 U.S.C. § 2761 *et seq.* Both Acts provide for the sale and shipment of domestic surplus military equipment to allied foreign governments. The transportation requirements of the FMSP provided respondents with the opportunity to implement a corrupt scheme. (JA 730) Respondents Friedman and Multi-

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[3] Predicated upon his role in the government's investigation, Guy Detrick filed a *qui tam* action, pursuant to the False Claims Act, 31 U.S.C. § 3729 *et seq.* The district court recognized the indisputable contribution made by Detrick, but dismissed his complaint, holding that Detrick lacked sufficient evidentiary detail of the fraud to qualify as a relator. *United States of America ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010 (E.D. Va. 1995). Detrick appealed from the order of dismissal, and settled the case with the United States while on appeal.

[4] The Court may take judicial notice of this indictment under Fed. R. Evid. 201. *United States of America v. Kevin Hodgson*, United States District Court, Eastern District of Virginia, Alexandria Division, Docket No. 97 CR 108 (filed March 13, 1997).

Modal conspired with D.F. Young to inflate charges for inland freight of military equipment, sometimes threefold, and to send the false invoices abroad for payment. (JA 476-82) Friedman and his co-conspirators divided the proceeds of their unlawful scheme and then invested a portion of the racketeering "profits" in the illicit business enterprise constituted by respondents—an "association in fact enterprise" within the meaning of RICO. (JA 32, 38, 499, 508-12, 517-19, 755-58, 765)

In Spring 1989, Panalpina joined the conspiracy. (JA 538-39, 791) In furtherance thereof, charges for inland transportation of freight under an FMSP contract between Panalpina and a foreign government were inflated by as much as three hundred percent. (JA 32, 782-88, 791, 869-70, 879-80) Respondents concealed the overcharges from the foreign government (and from the United States government), and the racketeering activity continued, unabated and undetected, while respondents reinvested the proceeds in the racketeering enterprise. (JA 525-40, 793)[5]

Petitioners Become the Unwitting Victims of the Scheme

Friedman eventually became dissatisfied with the level of illicit profits from the scheme. He complained to Panalpina that Multi-Modal was not being rewarded sufficiently. (JA 869-80) Respondents contrived a solution: Friedman would replace petitioners and assume control of the warehousing operation so that he could fraudulently overbill for warehouse services as well. Petitioners—who stood in the way of this new

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[5] Panalpina officers and employees who conspired to inflate these invoices refused to testify in this civil action, each invoking the Fifth Amendment privilege against self-incrimination. (JA 845, 864, 882, 921) This invocation was not surprising, as respondent Friedman (who had pled guilty) testified that he had bribed Panalpina employees to participate in the scheme. (JA 513-14, 877)

objective—became the direct, but unwitting, targets of the respondents' racketeering activity. (JA 33-34, 853-57, 859, 872-74, 880, 913-14, 932-33) Petitioners had contracted with Panalpina to provide warehouse handling services. (JA 309, 939, 664, 668-83) (This contract is hereinafter called the "Warehouse Contract.") In 1989 and early 1990, petitioners' formerly sound commercial relationship with Panalpina inexplicably began to deteriorate. (JA 948) Panalpina demanded sharp discounts (JA 594-607) and increases of staff wholly unnecessary to performance of the Warehouse Contract. (JA 627-33) It insisted on "charging back" petitioners for expenses unrelated to the Warehouse Contract (JA 608-27), declined to take reasonable steps to assist in the performance of the Warehouse Contract, and refused to lease needed additional space in the warehouse for performance of the Warehouse Contract. (JA 948, 633-36) Because of these actions, petitioners' costs became unreasonably high, and the Warehouse Contract became unprofitable.

Petitioners did not know that respondents used the proceeds of their racketeering activity to subsidize below-market rates and to pay "kickbacks" to Panalpina's senior employees to enlist them in the plan to force out petitioners. (JA 594-96, 606-7, 862, 917-18, 513-14) Although petitioners sought an explanation for the economic pressures to which they were subjected, their inquiries yielded only deceitful commercial justifications from Panalpina. Panalpina falsely asserted that Friedman had offered to perform the same work at lower rates, and insisted that petitioners match the rate if they wanted to retain the Warehouse Contract. Petitioners accordingly reduced their rates on several occasions, induced by these false statements, but this served merely to erode further their profits. (JA 593-607, 839) By April of 1990, this unlawful competition, subsidized by illegal gains, forced petitioners to abandon the Warehouse Contract. (JA 636-40) Petitioners had no indication that they were the object of a criminal scheme, much less that

one existed. They accordingly concluded that Multi-Modal, by virtue of its size and other business advantages, posed a legitimate competitive challenge that their small company could not meet. The proceeds from the illegal scheme continued to flow into respondents' treasuries, now augmented with the gains from the warehousing services formerly performed by petitioners. (JA 547-49, 641-42, 567-68, 577-79, 584-89)

Petitioners' Discovery of the Source of their Injury

On March 11, 1991, one of petitioners' former employees approached Guy Detrick with a Multi-Modal invoice containing a billing discrepancy so obvious as to suggest deliberate falsity. (Detrick worked for Friedman after he and Fast Forward had abandoned the Warehouse Contract.) Detrick for the first time began to suspect that respondents were engaged in criminal activities with respect to the FMSP, and surmised that he and his company might have been a victim of that criminal scheme. (JA 45-46, 643-49) Armed with knowledge of the one false invoice, Detrick entered the copy room in the Panalpina warehouse. There he saw a stack of similar documents, including a freight bill "that looked like it had been done in a cheap print shop, that once again for the second time that day had the exact same information but a huge mark-up on the price." (JA 644-48) Detrick continued his investigations and only then confirmed his suspicions that respondents and others were engaged in unlawful activity.

Petitioners had sustained economic harm—the loss of the Warehouse Contract—almost a year before, but had no ability to discover respondents' conspiracy and no reason to connect that conspiracy to the harm they had suffered. With the discovery of the source of the injury, petitioners were able to commence an investigation to determine the facts. Petitioners' cooperation with the government in the criminal investigation commenced soon thereafter, and the indictments, guilty pleas,

and convictions later followed. Petitioners commenced this action on March 9, 1995. (JA 648-49, 231-42, 256-79)

The Decision of the District Court

The district court granted summary judgment to respondents, finding that the RICO claims were time-barred by the four-year civil RICO statute of limitations. In reaching this determination, the district court concluded that under the "injury discovery" rule, petitioners' RICO claims had accrued in April 1990, at the moment petitioners sustained economic loss in the forced abandonment of the Warehouse Contract. (App. 1a-3a)

The Decision of the Court of Appeals

In affirming the judgment of the district court, the court of appeals held that under the "injury discovery" rule, petitioners' RICO claims had accrued at the moment they knew they had sustained economic loss, without regard to whether they knew or understood the source of that injury. (App. 22a-25a) The court of appeals rejected petitioners' contention that the "injury discovery" rule, as enunciated by the Fourth Circuit in *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211 (4th Cir. 1987), worked an injustice unless, by virtue of adherence to the "source" element of the rule, a plaintiff could reasonably be charged with actual or constructive notice that *someone* was responsible for an injury, and thus that the injury was actionable. Under the court of appeals' formulation, a plaintiff's knowledge of a bare economic loss, without more, marks accrual of a RICO claim. The court of appeals refused to incorporate the "source" element required by this Court's decision in *United States v. Kubrick*, 444 U.S. 111 (1979).

* * *

REASONS FOR GRANTING THE WRIT

I. The Holding Below Conflicts With This Court's Articulation Of The Federal "Injury Discovery" Rule Of Accrual And With The Holdings Of Other Circuit Courts Of Appeals Regarding The Appropriate RICO Accrual Rule.

As petitioners urge below, the accrual rule formulated by the Court in *United States v. Kubrick*, 444 U.S. 111 (1979), a rule that triggers the statute of limitations when a putative plaintiff discovers both his injury and its source or cause, is the most appropriate rule of accrual for claims under civil RICO. This rule strikes a fair balance between a diligent plaintiff's right to investigate and prosecute claims, and a defendant's right to be free of stale actions. As the facts of this case make abundantly clear, bona fide racketeering activity is not readily discernable from the discovery of economic harm alone. In this regard, civil RICO claims bear a compelling similarity to the tort of medical malpractice from which the *Kubrick* rule arose. For these reasons and others discussed below, the *Kubrick* rule is in all respects an apposite and fair uniform accrual rule for civil RICO claims, consistent not only with the remedial purposes of RICO but also with settled notions of accrual and tolling of federal claims.

A. The Federal "Injury Discovery" Rule Enunciated By *Kubrick* Is The Appropriate Rule Of Accrual Here.

In *Kubrick*, the Court granted *certiorari* to decide when a medical malpractice claim against the United States, asserted under the Federal Tort Claims Act, accrues for purposes of the statute of limitations. The Court articulated the issue as follows:

> [w]hether the claim 'accrues' within the meaning of the [Federal Tort Claims] Act when the plaintiff knows both the existence and the

> cause of his injury or at a later time when he also knows that the acts inflicting the injury may constitute medical malpractice.

Id. at 113. The court of appeals had held that the claim would accrue for limitations purposes only when the plaintiff knows that the injury he has sustained gives rise to legal rights—acts constituting medical malpractice—against a defendant. *Id.* at 121.

In rejecting the view advanced by the court of appeals, the Court held that the claim accrues, and the statute of limitations begins to run, when the plaintiff knows of his injury and its source. The Court noted that there is a significant demarcation in the medical malpractice context between knowledge of the injury and its source or cause, which "may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain" (*id.* at 122), and knowledge of the legal rights that flow from such injury and identification of its source. In the former case, once an injury is manifest and a putative plaintiff knows its source, he is in possession of all relevant facts necessary to investigate the wrong, and may be reasonably held to a standard of diligence in doing so. If the former conditions are satisfied, there is little reason to permit a plaintiff to postpone accrual, and myriad reasons—among them avoiding the assertion of stale claims and permitting repose for the sake of certainty—to require plaintiff then to act within the statutory limitations period. Predicated on this analysis, the Court held there that the claim accrues and the limitations period begins to run when the plaintiff knows of his injury and its source. *Id.* at 122-24.

The *Kubrick* rule is consistent with the general federal rule of accrual, but in one respect it is less restrictive. Under the "traditional" federal accrual rule, a claim accrues when the plaintiff knows or has reason to know of the injury that is the basis of the action. *E.g.*, *Cullen v. Margiotta*, 811 F.2d 698, 725 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987). The

"traditional" rule thus triggers the statute of limitations when the plaintiff knows of the injury he has sustained, without regard to his knowledge of the source or cause of the injury. Nor does the rule require any knowledge that the injury is an actionable one. *Kubrick*, in contrast, requires that two conditions be met: (1) knowledge of injury and (2) knowledge of the source of the injury. As the Court there held, only the confluence of the two conditions is suggestive enough to require that a putative plaintiff investigate further in order to prosecute a claim, and only that quantum of knowledge is sufficient fairly to charge a plaintiff with the requirement that he exercise due diligence in detecting the underpinnings of the claim and bringing suit.[6]

The policies that justify a less restrictive approach to claims under the Federal Tort Claims Act also apply to RICO claims. While RICO injury is economic in nature, and thus perhaps easier to recognize than a latent injury resulting from medical malpractice, the source or cause of a RICO injury is all the more difficult to discern. A RICO claim arises from

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[6] The *Kubrick* rule also is consistent with the RICO accrual rule adopted by the Eleventh, Tenth, Eighth, and Sixth Circuits, but in those circuits the courts of appeals have added the element of "pattern," apparently in recognition of the difficulty of ascertaining the existence and nature of the "pattern" element of the RICO offense. In those circuits, a RICO claim accrues when a plaintiff discovers or has reason to discover not only his injury but also the source thereof and the fact that the injury was part of a "pattern" of racketeering within the meaning of RICO. *See Klehr v. A.O. Smith Corp.*, 87 F.3d 231, 238 (8th Cir. 1996), *cert. granted*, ___ U.S. ___ (1997); *Caproni v. Prudential Securities Incorporated*, 15 F.3d 614, 619-20 (6th Cir. 1994); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820 (10th Cir. 1990), *rev. on other grounds, Lampf, Pleva, Lipkind, Prupis, & Petigrow v. Gilbertson*, 501 U.S. 350, 354 n.1 (1991); and *Bivens Gardens Office Bldg. v. Barnett Bank*, 906 F.2d 1546, 1554-55 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991). However great that difficulty, once a plaintiff may be charged fairly with knowledge of the injury and its source, he may also fairly be put to the task of investigating the existence of such a pattern.

criminal misconduct, and the details of its commission are typically, and inherently, covert. RICO activity is frequently attended by conduct designed to mislead or to impede government investigators and private plaintiffs alike in detecting a criminal scheme. Like the details regarding knowledge of the source and cause of an injury resulting from the tort of medical malpractice, knowledge of the source and cause of a RICO injury often is "in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." *Kubrick* at 122.

There are strong parallels between a RICO claim and a tort claim, parallels strong enough to suggest that a court-crafted rule that applies to the one may also apply to the other. A RICO claim was unknown at common law, and thus may not be characterized strictly as a tort. However, the common law (and our modern courts applying common law) recognized that violation of a criminal statute may give rise to civil liability in tort. *See generally* W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 36 (5th ed. 1984); *Cort v. Ash*, 422 U.S. 66 (1975). Similarly, the conduct that underlies RICO activity is tortious in nature. These factors, in addition to the fact that the *Kubrick* rule is consistent with long-settled federal law, argue strongly in favor of its adoption in the RICO context. The tort accrual standard of *Kubrick* is an appropriate one to import into the RICO arena.

Application of that rule to the case at bar not only illustrates the fundamental fairness of the rule, it also mandates reversal of the judgment of the court of appeals. Here, petitioners sustained harm when forced to abandon the once-profitable Warehouse Contract. There could have been a multitude of causes for that economic loss; petitioners attributed their loss to legitimate and fair competition. In their case, knowledge of the harm—the bare fact of economic harm without an equivalent indication that it might constitute a legally cognizable injury—was not sufficient to start the statute of

limitations running. To the contrary, only the additional element of the identification of the source of that injury would trigger the statute of limitations. Petitioners "discovered" their loss in April 1990, when they were forced to relinquish the Warehouse Contract, but petitioners did not discover the source of that injury—respondents' criminal wrongdoing and the unfair subsidization of competition with the proceeds of that wrongdoing—until March 1991. Petitioners brought their case within four years of *that* discovery.

B. The "Injury Discovery" Rule As Applied By The Fourth Circuit Is Inconsistent With The *Kubrick* Rule.

The "injury discovery" rule applied by the Fourth Circuit here (and the "injury discovery" rule adopted by other circuits) is contrary to *Kubrick*. Under that rule, enunciated in the Fourth Circuit in *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987), the court of appeals misapplied the accrual test to trigger the statute of limitations at the moment that petitioners "discovered" they had sustained an economic loss—that is, at the moment they abandoned the Warehouse Contract. As applied by the Fourth Circuit, therefore, the "injury discovery" rule is tantamount to a rule that starts the running of the statute before a putative plaintiff can fairly be held to inquiry notice of the existence of a RICO claim. Because discovery of the source or cause of the wrong is not required, the rule does not incorporate a nexus to the legal claim, and thus may operate to divest a putative plaintiff of his or her rights before the plaintiff is even aware that he or she *has* such rights. As such, it is fundamentally unfair and in conflict with the rationale of *Kubrick*.

Under *Kubrick*, in contrast, knowledge of the injury and its source is a condition to the accrual of the claim. The rationale behind this rule rests upon the difficulty in ascertaining the source of the injury. No argument can be advanced that a

RICO plaintiff faces less difficulty than a medical malpractice plaintiff in ascertaining the source of the wrong, as the facts of this case make clear. Yet disparate articulation and application of accrual standards punishes the former by cutting off her rights, while leaving the latter free to pursue claims when sufficient information has come to light to make it reasonable and seemly that he be required to do so. No lesser right should be accorded a RICO plaintiff than a federal tort claim plaintiff.

Once a plaintiff is aware that he has sustained an economic loss, and that the loss was caused by a putative defendant, it is reasonable to put the plaintiff to the burden of exercising diligence to investigate, to retain counsel, and to bring suit within the limitations period. To the contrary, a rule of accrual that would start the statute of limitations running before both conditions were satisfied, while it would have the virtue of certainty, is a rule that would foreclose meritorious claims and would deny to putative plaintiffs the right to bring suit under RICO before the plaintiff was even aware that he or she had rights that could be addressed under the statute. The "injury discovery" rule of the Fourth Circuit, applied here to bar petitioners' claims, does precisely that. As applied to the case at bar, the rule operated to divest petitioners of their rights four years from the date they sustained economic harm, but not four years from the date when they knew they had been injured and knew the source of that injury. Considerations of fundamental fairness alone suggest that the statute of limitations not run before the putative plaintiff knows he may investigate a claim. Any other rule would be unduly restrictive, and inconsistent with the remedial nature of RICO.

C. The Accrual Rules Adopted By The Circuits Are In Conflict With One Another And With The *Kubrick* Rule.

The "injury discovery" rule of the Fourth Circuit is not only in conflict with the federal "injury discovery" rule, it is also in conflict with the accrual rules adopted by other courts of appeals. The courts of appeals have struggled to articulate a uniform standard, but their struggle has resulted only in sharp disagreement as to the proper rule. No court of appeals has crafted a fair and certain rule that is firmly grounded in this Court's jurisprudence, a rule such as the one petitioners urge the Court to adopt.

Although their formulations are slightly different and are sometimes unclear, the United States Courts of Appeals for the First, Second, Fourth, Fifth, Seventh, and Ninth Circuits hold that a RICO claim accrues when the plaintiff discovers or should have discovered the injury underlying the RICO cause of action. *Rodriguez v. Banco Cent.*, 917 F.2d 664, 665-66 (1st Cir. 1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987); *La Porte Constr. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464 (7th Cir. 1992) (purportedly following *Kubrick*); and *Beneficial Std. Life Insurance Co. v. Madariaga*, 851 F.2d 271, 274-75 (9th Cir. 1988).

The United States Courts of Appeals for the Sixth, Eighth, Tenth, and Eleventh Circuits hold that a RICO claim accrues when the plaintiff discovers or should have discovered both his injury and its source, and the defendant's pattern of racketeering activity. *Caproni v. Prudential Securities Incorporated*, 15 F.3d 614, 619-20 (6th Cir. 1994); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820 (10th Cir. 1990), *rev. on other grounds, Lampf, Pleva, Lipkind,*

Prupis, & Petigrow v. Gilbertson, 501 U.S. 350, 354 n.1 (1991); and *Bivens Gardens Office Bldg. v. Barnett Bank*, 906 F.2d 1546, 1554-55 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991). The Third Circuit subscribes to the "last predicate act" rule in which accrual awaits the last predicate racketeering act of defendants. *Glessner v. Kenny*, 952 F.2d 702, 706 (3d Cir. 1991).

All of these rules share a common attribute—they are in conflict with the rule enunciated by this Court in *Kubrick*. Petitioners say that *Kubrick* is the right rule for RICO accrual.

II. This Case Presents Apposite And Compelling Factual Circumstances In Which To Decide An Important Question Of Federal Law And To Resolve The Conflict Among The Circuits As To That Question.

In *Agency Holding Corporation v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987), the Court promulgated a uniform limitations period for RICO claims. The Court there rejected application of analogous state limitations period to RICO in order to prevent forum shopping, promote certainty in application, and avoid complex, time-consuming, and costly litigation. For much the same reasons, it is no less desirable for the Court to promulgate a uniform and certain rule of accrual for RICO claims. The existing regime—with different circuits applying different accrual rules—encourages forum shopping, results in virtually constant relitigation of the same issue, leads to continuing uncertainty for litigants, and, worse, poses the possibility that the accrual rules of some circuits may result in unduly short periods of time to bring RICO claims, thus "thwart[ing] the legislative purpose of creating an effective remedy" for those injured by reason of a violation of the statute. *See Agency Holding* at 154.

This case involves a paradigm of civil racketeering activity, and thus presents apposite and compelling factual

circumstances in which to promulgate an appropriate uniform accrual rule. Here, there are underlying criminal convictions for defrauding the United States and foreign governments. As a result, the conduct in violation of RICO is all the more certain and concrete, and is all the more clearly true racketeering within the meaning of RICO. This is not a mere breach of warranty claim dressed in the clothes of a RICO violation. To the contrary, in this case, absent the private claim expressly provided by RICO, petitioners would have had no common law claim that would have provided an effective remedy. This case presents just the kind of unlawful conduct that RICO was intended to eradicate. In short, this case presents a clear picture of a Section 1962(a) RICO claim in the context of actual criminal wrongdoing for which respondents have been held criminally responsible.

Similarly, this case presents a clear and delineated example of the development of a genuine RICO claim and, in that context, of how petitioners' knowledge concerning their injury and its source arose. In this case there is a clear demarcation between discovery of the mere occurrence of economic harm—what the court of appeals termed the discovery of "injury" and held, without more, to be the triggering event—and discovery of the source or cause of that injury, the event which triggered actual inquiry into the claims ultimately asserted. In this case, what appeared at first to be the result of legitimate competition or, at worst, a simple breach of contract claim, was revealed by passage of time and the discovery of the source of the injury to be a complex RICO scheme arising from a conspiracy to defraud the United States.[7] Simply stated, the

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[7] Unlike most civil RICO claims, this case arose under Section 1962(a) of RICO. In contrast to claims arising under Section 1962*(c)*, in which the conduct of the RICO enterprise causes the harm, here the injury was the result of investment of the proceeds of racketeering in the RICO enterprise. Thus,

(continued...)

facts here squarely present the conflict between the "injury discovery" rule as enunciated by the Fourth and other circuits, and the "injury plus source discovery" rule enunciated by this Court in *Kubrick*. For all these reasons, this case is an appropriate vehicle by which to announce an accrual rule which will govern RICO.

Finally, that the question presented in this case is an appropriate one for review by this Court has been made clear by the Court's actions in the last year. The Court has previously granted writs of *certiorari* to review the central question presented here in *Grimmett v. Brown*, No. 95-1723, and in *Klehr v. A.O. Smith Corporation*, No. 96-663. We do not reiterate the additional arguments advanced by petitioners there in support of their petitions as the granting of *certiorari* in those cases would appear to indicate that the Court wishes to resolve the question presented.

III. The Pendency Of *Klehr* Mandates The Grant Of *Certiorari* In This Case.

The Court granted *certiorari* in *Klehr v. A.O. Smith Corporation*, No. 96-663, on January 10, 1997, to decide the identical question presented here, and heard argument in that case on April 21, 1997. The pendency of *certiorari* in *Klehr* bears significantly on the Court's treatment of the instant petition. In this case, however, the dispositive question turns upon the distinction between discovery of the RICO injury alone, and the discovery of the source of that RICO injury. In *Klehr*, by contrast, the Court may resolve the case on its facts simply by holding that the "last predicate act" rule is not the

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[7] (...continued)
the injury was more attenuated, more latent, and hence more difficult to detect. In this context, fairness dictates that accrual await discovery not only of injury, but also of its source.

proper RICO accrual doctrine. While in *Klehr* the conduct which harmed plaintiffs occurred in the 1970s, and plaintiffs waited almost two decades to bring suit, in this case petitioners brought their suit within four years of the date they discovered the source of their RICO injury. This case, therefore, provides different, and more compelling, factual circumstances, circumstances of the type that arise in the majority of RICO cases.

In addition, apart from the position apparently taken by a single *amicus* (*see* Brief of Washington Legal Foundation, the Manufacturers Alliance, and The Allied Education Foundation as *Amici Curiae* in Support of Respondents, *Klehr* (No. 96-663)), neither the parties in *Klehr* nor their numerous other *amici* urge the rule petitioners urge here. At the very least, this case provides the Court with a vehicle to elucidate its holding on RICO accrual in a setting that will have more pertinence to future RICO cases. Finally, because this case presents the question as to RICO accrual in a concrete setting involving true racketeering activity, the results here will more reliably reflect the policies underlying RICO, and will simultaneously further the goal of certainty in application of the rule this Court enunciates.

In any event, the Court should grant *certiorari* pending the outcome in *Klehr* because the holding in *Klehr* may determine the outcome here. Alternatively, petitioners ask that the Court defer consideration of this petition pending the decision in *Klehr*. Predicated upon the outcome in *Klehr*, the Court may grant the petition and summarily reverse. *See, e.g.*, *Keney v. New York*, 388 U.S. 440 (1967). Alternatively, the outcome in *Klehr* may support vacatur of the judgment of the court of appeals and a remand to that court in light of the Court's action in *Klehr*. *See, e.g.*, *Eckerd Drugs, Inc. v. Brown*, 457 U.S. 1128 (1982).

CONCLUSION

For the various reasons set forth herein, this petition for a writ of certiorari should be in all respects granted.

Respectfully submitted,

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